

The Honorable Thomas S. Zilly

UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

STRAITSHOT RC, LLC, a Delaware
corporation,

Plaintiff,

v.

TELEKENEX, INC., a Delaware corporation;
MARK PRUDELL and JOY PRUDELL,
husband and wife and the marital community
composed thereof; MARK RADFORD and
NIKKI RADFORD, husband and wife and the
marital community composed thereof; JOSHUA
SUMMERS and JULIA SUMMERS, husband
and wife and the marital community composed
thereof; ANTHONY ZABIT and JANE DOE
ZABIT, husband and wife and the marital
community composed thereof; BRANDON
CHANEY and JANE DOE CHANEY, husband
and wife and the marital community composed
thereof; MAMMOTH NETWORKS, LLC and
BRIAN WORTHEN and JANE DOE
WORTHEN, husband and wife and the marital
community composed thereof,

Defendants.

Case No. 2:10-cv-00268-TSZ

**TELEKENEX DEFENDANTS'
MOTION FOR PARTIAL SUMMARY
JUDGMENT**

***NOTE ON MOTION CALENDAR:
December 17, 2010***

ORAL ARGUMENT REQUESTED

**TELEKENEX DEFENDANTS' MOTION FOR PARTIAL
SUMMARY JUDGMENT - 1**
(Case No. 2:10-cv-00268-TSZ)

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TELEKENEX, INC., a Delaware Corporation,

Third-Party Plaintiff,

v.

STRAITSHOT RC, LLC., a Delaware limited liability company; STEPHEN PERRY and JANE DOE PERRY, and the marital community composed thereof; and ANDREW GOLD and JANE DOE GOLD, and the marital community composed thereof,

Third-Party Defendants.

MAMMOTH NETWORKS, LLC, a Wyoming limited liability company,

Third-Party Plaintiff,

v.

CLARITAGE STRATEGY FUND, L.P., a Cayman Islands limited partnership, and STRAITSHOT RC, LLC, a Delaware limited liability company,

Third-Party Defendants.

I. RELIEF REQUESTED

Defendant TELEKENEX, INC., Brandon Chaney, Anthony Zabit, and Joshua Summers (hereafter, "The Telekenex Defendants") request that the Court award summary judgment as to (1) Plaintiff's claim that the Telekenex Defendants violated the Lanham Act; (2) Plaintiff's claim that the Telekenex Defendants violated the Washington Consumer Protection Act; (3) Plaintiff's claim that the identity of their customers is a "trade secret;" and (4) Plaintiff's claim that the Telekenex Defendants solicited employees of Straitshot in violation of a duty not to do so.

II. FACTS RELEVANT TO THIS MOTION

A. Straitshot's Business was Failing in 2008.

By December, 2008, Straitshot owed its vendors more than \$700,000, and complaints and demands to be paid were numerous and overwhelming. Straitshot's CEO, Andrew Gold

1 conceded as much:

2 Q Let me change the question. Isn't it true that [Plaintiff's responses to Telekenex'
3 discovery requests] show that at the end of December, 2008, Straitshot owed its vendors
4 more than \$700,000?

5 A That is correct.

6 Q Okay. And within this list [set forth in Plaintiff's response to RFP 16], did you
7 notice any companies who had been complaining that they were not being paid on time?

8 A I haven't gone through this list.

9 Q Take a minute and see if you recognize any customers who complained that they
10 were not -- I mean vendors who complained they were not being paid.

11 A I'm sure that there -- I'm not sure of them. I mean, I imagine there are.

12 Excerpt of Deposition Transcript of Gold¹ at 62:7-19; Exhibit 381. Although Mr. Gold was
13 unable to recall any customers with complaints about Straitshot's failure to pay invoices, many
14 of Straitshot's accounts were so far in arrears that service was discontinued. By way of example:

15 Q XO shut off the circuits to Straitshot Communications on February 6, didn't it?

16 A Yes, it did.

17 Q For nonpayment?

18 A Yes.

19 ...

20 Q Drawing your attention to [Exhibit 392] You write, "One of Straitshot's toll-free
21 support numbers was wrongfully deactivated by Simple Signal, one of Straitshot's
22 vendors, in January, 2009 without notice in an attempt to gain leverage in a billing
23 dispute."... And the billing dispute, can you tell me a little bit about that? What was the
24 billing dispute? Were you paying Simple Signal?

25 A Simple Signal was a provider of voice services and SIP trunks that had proved to be a
26 disaster as an initial partner, and we subsequently switched to Voxitas as our SIP

¹ True and correct copies of excerpts of the deposition transcript and exhibits of Andrew Gold are attached to the Declaration of Tift as Exhibit 1.

1 provider partner. And the dispute had to do with their insistence on being paid for
2 services they provided over a period of time where the services didn't work and, in fact,
3 resulted in the loss of some of our business.

4 Gold Tr. at 66:13-17; 204:22-206:4; Exhibit 392. Covad, Straitshot's largest circuit provider,
5 threatened to discontinue service to Straitshot due to a large balance near the same time:

6 Q Will you look down in the middle of [Exhibit 402] to a sentence that says, "Please be
7 advised that payment in the amount of \$265,704.06 must be received by noon on January
8 28, 2009."

9 A I see that.

10 Q And is it your understanding that at the date of this message, January 27th, that
11 amount was owed by Straitshot to Covad?

12 ...

13 A Well, according to this, that would be a total balance; but other than this document, I
14 don't – I don't know exactly what the balance was with Covad.

15 Gold Tr. at 348:12-19; 349:13-15; Exhibit 402.²

16 Also by December 2008, Straitshot abandoned its leased premises, breached its lease,
17 transferred its equipment and property to a storage unit,³ and instructed its engineers to work
18 from home. Knowledge of Straitshot's "midnight moveout" was well-known to its vendors and
19 creditors. *See*, Exhibit 339, Deposition of Perry; Perry Tr. 117:14-119:14.⁴

20 **B. There is no Evidence of Unlawful Solicitation.**

21 ² Disconnect notices were also received from Voxitas (September 2008); U.S. Signal (December 2008), Co-
22 Location.com (October 2008-February 2009), Covad (November 2008-January 2008); Qwest (January 2009-
23 February 2009), NewEdge Networks (February 2009) and Internap (December 2008), as well as numerous vendor
24 inquiries about past due invoices and collection activities. *See*, Declaration of Tift.

25 ³ *See*, Transcript of Summers, at 67:14-68:10.

26 ⁴ True and correct excerpts of the deposition and exhibits of Steve Perry are attached as Exhibit 2 to the Declaration
of Tift. Mr. Perry explained that Straitshot RC, Plaintiff here, is an entity wholly owned by the Claritage Strategy
Fund. *See*, Perry Tr. at 62:12-14; Exhibit 363. Mr. Perry is the Director of Claritage Strategy Fund, *see, Id.* On
behalf of Claritage Capital, Mr. Perry signed a "management contract" with Straitshot Communications, Inc.,
pursuant to which Claritage was to offer "management services" to Straitshot, and Straitshot was to pay Claritage
sums in amounts ranging from more than \$13,000/month to \$25,000/month. Perry Tr. at 71:23-72:1; 78:3-79:13.
Mr. Perry testified the "management duties" he assumed included "provid[ing] direction both directly to the
company and also to Minki Synn and Andrew Gold relative to [Straitshot]." Perry Tr. at 86:22-87:13.

1 Straitshot's precarious position was well known to its employees as well as to its vendors.
 2 See, e.g., Gold Tr. at 65:11-66:12; Ex. 382; Pauole Tr. 17:1-11; Dickason Tr. 11:6-9.⁵ In late
 3 January, 2009, all of the Straitshot engineers resigned. Straitshot alleges that Telekenex
 4 unlawfully lured them away, but there is no support for this contention.

5 First, all of the engineers were at-will employees, who were free to leave Straitshot's
 6 employment with or without notice. Pauole Tr. 15:14-20; Dickason Tr. 11:15-12:13; Summers
 7 Tr. 112:7-13, 124:7-125:21, 192:17-193:4; Ex. 46. Mr. Pauole and Mr. Dickason began
 8 searching for employment on-line toward the end of 2008. Pauole Tr. 11:4-12:22; Dickason
 9 11:6-11. Josh Summers had also begun to explore other employment. Summers Tr. at 74:1-11.
 10 Despite the direct testimony of the employees who left Telekenex explaining the reasons and
 11 motivations for their resignations, Plaintiff contends that Prudell and Radford, (who, for
 12 purposes of this motion, had employment agreements that appear to prohibit solicitation of
 13 Straitshot employees), actively solicited the engineers. In fact, Straitshot has no admissible
 14 evidence that Prudell or Radford spoke one word to Summers or the other Straitshot engineers.
 15 The engineers, to a man, deny that they were solicited by Prudell and Radford. Pauole Tr. 10:11-
 16 14, 15:14-17:16; Dickason Tr. 21:22-23:25; Summers Tr. at 101:3-6, 102:12-25.

17 Mr. Gold's testimony is wholly inadequate to establish Plaintiff's claim to the contrary:

18 Q What did either defendant Prudell or defendant Radford say to Josh Summers to
 19 solicit his employment?

20 A My personal knowledge is not -- does not include having been privy to the
 21 conversations that they had.

22 Q Okay. And how about the other engineers, do you actually know that either Prudell
 23 or Radford solicited an engineer?

24 A I do know that, but I did not -- I didn't have any conversations with them about it.

25 Q How do you know that?

26 ⁵ True and correct excerpts and exhibits of the depositions of Pauole, Dickason, and Summers are attached as Exhibit 3, 4 and 5 to the Declaration of Tift.

1 A Well, I've seen other evidence, including e-mails and other communications, that
2 either directly or -- suggested or confirm it or indirectly suggest it.

3 Gold Tr. at 132:22-133:9. These emails are hardly the conclusive evidence Mr. Gold suggests
4 they are:

5 Q And in what ways did you believe that these things that you've seen have suggested
6 that Mark Radford and Mark Prudell solicited Josh Summers and the other engineers to
7 go work at Telekenex?

8 A [Prudell and Radford] communicated with customers prior -- Straitshot customers
9 prior to the engineers leaving regarding that fact.⁶ I do know that Mr. Prudell was in
communication with Mr. Summers during the time between their departure...

10 Q And how do you know that?

11 A I saw when I was with Josh Summers leaving a luncheon...sometime during the week
12 of January 19th when I was in Seattle, Josh's phone rang, and it was Mr. Prudell calling.

13 Q Okay. And do you know for a fact that they talked about Josh coming to work at
14 Telekenex?

15 A As I said, I didn't hear their conversation.

16 Q And the e-mail that you're referring to is an e-mail, I believe, that was written by
17 Mark Prudell, and it said something along the lines to a customer that Josh was coming to
work at Telekenex?

18 A That was at least -- There was, as I recall, more than just one document
19 demonstrating that that message was expressed. I've also received other documents, e-
mails, et cetera from third parties saying that was what was represented to me.

20 Q Okay. And the fact that Josh is coming to work at Telekenex doesn't mean -- it
21 doesn't also include the statement, "I solicited Josh." You never see that anywhere, do
22 you?

23 A I haven't stated that I saw that.

24 Gold Tr. at 133:10-134:19. Ultimately, Mr. Gold concedes that he made an assumption that the

25 ⁶ The email Mr. Gold is referring to actually says "Josh is in San Francisco interviewing for a job." A few days
26 later, Mr. Shaw wrote that "supposedly Josh is going to work for Telekenex as well." See, page 44 and Exhibits 143
and 145, Transcript of Shaw, excerpts of which are attached as Exhibit 6 to Decl. of Tift.

1 engineers were solicited—but that he has no direct, testimonial knowledge that his assumption
2 was true. Gold Tr. at 136:5-18. Mr. Gold’s working assumption, simply stated, is untrue.

3 **C. Straitshot Ceased offering Services to Customers on February 20, 2009.**

4 Straitshot stopped offering services to its customers on February 20, 2009. *See*, Ex. 381,⁷
5 Deposition of Gold. Even before February 20, 2009, on February 12 and later, on February 16,
6 2009, Straitshot publicly “released” its customers from their contractual obligations to Straitshot,
7 and allowed them to obtain the same services that had been provided by Straitshot from other
8 vendors. *See*, Gold Tr. at 384:16-386:7; Ex. 409; Ex. 393 (“[A]s you know, we are not requiring
9 any customer to take advantage of [the opportunity to switch to Voxitas] and want you to
10 understand that you are free to explore your options. If you choose to migrate to another supplier
11 Straitshot will cooperate with that transition.”). Mr. Gold explained Straitshot’s decision to
12 cease its business operations as follows:

13 Q So why did you decide to stop providing services?

14 A Because we felt that it was more important to allow our customers to -- We didn't
15 feel it was possible for us to continue operating, given the attacks that we were under
16 from the defendants.

17 Q And what specifically were the defendants doing to you on February 16th that
18 prevented you from offering services?

19 A There was a concentration of acts that ultimately led us to the decision that we were
20 not going to be able to survive.

21 Q What were they doing? What happened?

22 A They were attacking our customer base. They were unlawfully diverting circuits in
23 conjunction with Mammoth.⁸ They were stealing our information.⁹ They were lying to

24 ⁷ Answer to Interrogatory No. 16.

25 ⁸ This assertion is patently untrue. Not one Straitshot customer was “repointed” from a Straitshot circuit to a
26 Telekenex circuit (or, for that matter a Voxitas circuit) until Mr. Worthen received confirmation that that was the
customer’s intention. Plaintiff offers no admissible evidence in support of any “diversion” of a circuit until it
released its customers on February 16 (or the customers otherwise made an election to obtain services from another
company). *See*, Worthen Tr. at 135:21-137:12; attached as Exhibit 7 to Decl. of Tift; Ex. 386, *infra*.

⁹ This contention is likewise unsupported by any facts absent inflammatory accusations by Plaintiff.

1 our customers. They were creating a circumstance of fear. They were undermining
 2 every effort we made to save the company and to solve problems. They were throwing
 barriers up in front of us every chance they got, and --

3 Gold Tr. at 152:11-153:6 (emphasis added).

4 When asked for specifics, however, Mr. Gold admitted he “did not know” of any revenue
 5 that Straitshot was deprived of relative to leads that were allegedly “diverted” to Telekenex.
 6 Gold Tr. at 109:8-17. Mr. Gold was also unable to state, with any level of particularity what
 7 revenue was lost or what customers were lost by Straitshot due to the acts of the Telekenex
 8 Defendants. *See*, Gold Tr. at 111:6-13; 145:24-148:11. Finally, Mr. Gold was unable to
 9 articulate one act that the Telekenex Defendants undertook after Straitshot released its customers
 10 in mid-February 2009—or any credible threat that Telekenex intended to continue “attacking the
 11 customer base” after Straitshot released its customers from their contractual obligations and/or
 12 stopped offering services. Mr. Perry’s testimony was the same—a listing of possibilities, with
 13 no actual evidence that Telekenex took any actions toward Straitshot after it failed nor an
 14 indication that Telekenex intended to do so. *See*, Perry Tr. at 218:18-220:4.

15 **D. There is No Evidence that any Telekenex Defendant made a False Statement**
 16 **Concerning Straitshot.**

17 Plaintiff contends that the Telekenex Defendants made false and misleading statements
 18 about Straitshot, causing the company damage. *See*, e.g., Third Amended Complaint, ¶152
 19 (Telekenex said “Straitshot is in some extreme financial trouble right now and Straitshot
 20 customers are in jeopardy of their circuits with underlying carriers being disconnected due to non
 21 payment;” ¶155-158 “falsely stat[ing] that Straitshot was going out of business.”); *see*, also,
 22 testimony of Gold at 137:3-16 (“Among the lies that they told was that Straitshot had closed its
 23 doors, that it was out of business, that it was in imminent danger of being cut off from various
 24 carriers...[a]s far as I can tell, it had no basis in fact.”) However, as can be seen from the record,
 25 above, Straitshot was in extreme financial trouble, Straitshot received numerous notices of
 26 disconnect from its vendors, and Straitshot customers actually did suffer outages because

1 vendors disconnected Straitshot for non-payment. Mr. Gold complains that the Telekenex
 2 Defendant "falsely" reported that Straitshot was about to "close its doors," but in fact Straitshot
 3 did "close" its office and abandon the leased office with no notice to customers or vendors. In
 4 fact, at one point, one of Straitshot's lenders, Vencore, was attempting to contact the company to
 5 discuss its account, but was literally unable to locate the company for that visit:

6 I've gotten several calls from Jillian at Vencore Capital trying to find out, "quote, 'what's
 7 going on,'" end quote, "and get our physical address so they can come out and visit us.
 8 She says she's been trying to call you (Phil) but is not able to get through.

9 I was not sure what was the message I'm supposed to tell our lenders (or other vendors)
 10 for that matter. I gave her our P.O. box address, but when she drilled further for where
 11 our office is, I didn't know what you were telling them. I disclosed only that I work as a
 12 telecommuting employee and do not have the new corporate address other than the P.O.
 13 box for mail receipt.

14 *See*, Exhibit 331 email from Straitshot's "Project Manager," Joy Hunsinger. The statements
 15 attributed by Straitshot to the Telekenex Defendants were not flattering, but they were also not
 16 demonstrably false or misleading.

17 Moreover, Plaintiff is very well aware that the statements attributed to Telekenex had
 18 little or no effect with respect to customers. For example, on February 3, 2009, Mr. Balch, on
 19 behalf of Straitshot customer MacKay and Sposito, wrote:

20 Q "Andrew, I'm glad to hear your company is not closing its doors. However, I've
 21 contacted several people there about closing our account and ending our contract, and I
 22 have not heard anything. *We've had the service disconnected in our office for over a*
 23 *month and are not using it*, and I would like a response that you received this e-mail
 24 regarding terminating our service."

25 Gold Tr. at 82:23-83:10 (emphasis added); Exhibit 386. Mr. Shaw, another of Straitshot's
 26 customers, testified that he attempted to terminate its contract with Straitshot in August, 2008,
 and felt, by January 2009, that "we were not staying with Straitshot, whether we had to battle the
 contract or if they were going out of business." The reason, according to Mr. Shaw, was that
 Straitshot had never performed its contractual obligations to Super Supplements. Shaw Tr. at
 50:23-25; 85:21-87:12.

E. Straitshot's CEO Conceded that the Identity of Straitshot Customers Identities was not Confidential.

Among the claims Plaintiff brings against the Telekenex Defendants is a claim for "stealing" Straitshot's trade secrets, including the identity of Straitshot's customers. Straitshot's CEO, Mr. Gold, however, conceded that the identity of Straitshot's customers was not confidential:

Q But other than that, you didn't treat the fact of somebody being a client to be itself confidential information?

A No. Not as a general practice, no.

Q Just for the sake of the record, my statement is accurate? Sometimes when you respond no it's unclear whether --

A Oh, I see what you're saying.

Q -- that you're really saying no, you're wrong, or

--

A As a general practice we did not keep the identity of businesses we had direct customer relationships with confidential, ...unless otherwise obligated by contract.

Gold Tr. at 438:3-17. Mr. Gold's testimony eliminates any claim or cause of action related to confidentiality or a trade secret violation relative to the identity of a Straitshot customer. The Telekenex Defendants request that Court so find, and dismiss, as a matter of law, any claim for breach of confidentiality or trade secret violation based upon the identity of a Straitshot Customer.

III. EVIDENCE RELIED UPON

The Telekenex Defendants rely on the following documents and exhibits in support of their Motion for Partial Summary Judgment: (1) Declaration of Leigh Ann Tift and exhibits attached thereto, and the pleadings, files and records herein.

IV. ARGUMENT AND AUTHORITY

A. Standard Applicable to the Motion.

Summary judgment is appropriate when the pleadings, affidavits and other material present no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. *Rebel Oil Co, Inc. v. Atlantic Richfield Co.*, 51 F.3d 1421, 1432 (9th Cir. 1995). “By its very terms, this standard provides that the mere existence of some alleged factual dispute between the parties will not defeat an otherwise properly supported motion for summary judgment; the requirement is that there be no genuine issue of material fact.” *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 247-48 (1986). “As to materiality, the substantive law will identify which facts are material. Only disputes over facts that might affect the outcome of the suit under the governing law will properly preclude the entry of summary judgment.” *Id.*, at 248.

“Where the record taken as a whole could not lead a rational trier of fact to find for the non-moving party, there is no genuine issue for trial”. *Matsushita Elec., Inc., Co., v. Zenith Radio Corp.*, 475 U.S. 574, 587, (1986). More specifically, the party resisting summary judgment “must do more than simply show that there is some metaphysical doubt as to the material facts,” and must produce more than a “mere scintilla” of evidence to demonstrate a genuine issue of material fact and avoid summary judgment.

B. The Telekenex Defendants did not Violate the Lanham Act.

Plaintiff alleges that the conduct of the Telekenex Defendants violated the Lanham Act, 15 U.S.C. §1125(a). The statute, which has considerable breadth, provides that a violation is established where:

(a)(1) Any person who, on or in connection with any goods or services ... uses in commerce any word, term, name, symbol, or device, or any combination thereof, or any ... false or misleading description of fact, or false or misleading representation of fact, which—

(A) is likely to cause confusion, or to cause mistake, or to deceive as to the affiliation, connection, or association of such person with another person, or as to the origin, sponsorship, or approval of his or her goods, services, or commercial activities by another person, or

(B) in commercial advertising or promotion, misrepresents the nature, characteristics, qualities, or geographic origin of his or her ... goods, services, or commercial activities,

1 shall be liable in a civil action by any person who believes that he or she is or is likely to
2 be damaged by such act.

3 Seemingly, Plaintiff is contending that the Telekenex Defendants engaged in some kind of false
4 advertising. Accordingly, Plaintiff must show:

- 5 (1) a false statement of fact by the defendant in a commercial advertisement about its own
6 or another's product;
- 7 (2) the statement actually deceived or has the tendency to deceive a substantial segment of
8 its audience;
- 9 (3) the deception is material, in that it is likely to influence the purchasing decision;
- 10 (4) the defendant caused its false statement to enter interstate commerce; and
- 11 (5) the plaintiff has been or is likely to be injured as a result of the false statement, either
12 by direct diversion of sales from itself to defendant or by a lessening of the goodwill
13 associated with its products.

14 *Southland Sod Farms v. Stover Seed Co.*, 108 F.3d 1134, 1139 (9th Cir. 1997); *Nat'l Prods. v.*
15 *Gamber-Johnson LLC*, 699 F. Supp. 2d 1232, 1237 (W.D. Wash. 2010).

16 1. Plaintiff does not Establish a "False or Deceptive" Statement.

17 To demonstrate falsity, Plaintiff must show either that the statement was literally false or
18 that the statement was literally true but misleading. *Southland Sod Farms*, 108 F.3d at 1139.
19 "When evaluating whether an advertising claim is literally false, the claim must always be
20 analyzed in its full context." *Id.* "Where a statement is not literally false and is only misleading
21 in context...proof that the advertising actually conveyed the implied message and thereby
22 deceived a significant portion of the recipients becomes critical." *William H. Morris Co. v.*
23 *Group W, Inc.*, 66 F.3d 255, 258 (9th Cir. 1995) (finding that this requirement was not met
24 where evidence showed less than 3% of the intended audience was deceived).

25 The "false or deceptive representations" that are the basis for a Lanham Act claim must
26 be such that they "actually deceived a significant portion of the consuming public." *Harper*

1 *House, Inc. v. Thomas Nelson, Inc.*, 889 F.2d 197, 208 (9th Cir. 1989). A rebuttable presumption
 2 of deception may arise if an advertisement is literally false or if a competitor expends
 3 “substantial funds in an effort to deceive consumers and influence their purchasing decisions.”
 4 *Nat’l Prods.*, 699 F. Supp. 2d at 1237, 1240 (citing *U-Haul Intern., Inc. v. Jartran Inc.*, 793 F.2d
 5 1034, 1040-41 (9th Cir. 1986)). However, in the absence of literal falsity and actual deception,
 6 summary judgment should be granted. *See, e.g., Nat’l Prods.*, 699 F. Supp. 2d at 1239 (granting
 7 partial summary judgment with regard to literally true statement); *Fortunet, Inc. v. Gametech*
 8 *Ariz. Corp.*, 2008 U.S. Dist. LEXIS 96565, at *21-22 (D. Nev. Nov. 26, 2008) (granting partial
 9 summary judgment to defendant with regard to literally true statements that did not actually
 10 deceive consumers). None of the relevant criteria are present here.

11 Mr. Perry testified that the false statements he attributed to the Telekenex Defendants
 12 were “such as we, Telekenex, have permission from Straitshot to take -- to take this customer
 13 onto our platform. That’s -- those were false statements. Things like that.”¹⁰ Perry Tr. at 166:3-
 14 22. Mr. Perry could not identify any customer who was told this, nor does this assertion meet the
 15 test set forth by the Ninth Circuit relating to deception of a “significant portion of the consuming
 16 public.” He believed that other false statements were made as well, but had no independent
 17 memory of what those statements might be. *Id.* Mr. Gold’s attribution of false statements is
 18 discussed *infra*. As noted above, the message that Straitshot was in dire financial straits, that
 19 service disruptions were threatened due to nonpayment and/or that the company closed its office
 20 were not false.

21 Plaintiff’s witnesses did not identify any statements which qualify as a substantive
 22 violation of the Lanham Act. The Telekenex Defendants request that the Court so find, and
 23 dismiss this claim.

24 _____
 25 ¹⁰ Mr. Perry later testified that he felt that conversations between he and Mr. Zabit and Chaney regarding the
 26 purchase of Straitshot’s assets were deceptive, that Josh Summers was “deceptive” when he was asked what his
 plans were at the time of his resignation, and that Brian Worthen, of Mammoth was untruthful. None of these
 statements are “false advertising” in the context of a Lanham Act violation. *See*, Perry Tr. at 450:7-454:24.

1 **2. Plaintiff does not Establish Either Materiality.**

2 The Lanham Act requires Plaintiff to show that the complained-of statements are
3 material, or “likely to influence [a] purchasing decision.” *Southland Sod Farms*, 108 F.3d at
4 1139. Consumer surveys are the most effective way to establish the materiality of deception,
5 though materiality may also be established through direct consumer testimony. *Skydive Ariz.,*
6 *Inc. v. Ouattrocchi*, 2009 U.S. Dist. LEXIS 128418, at *88-90 (D. Ariz. Feb. 2, 2009); *see also*
7 *Southland Sod Farms*, 108 F.3d at 1140 (“Reactions of the public are typically tested through the
8 use of consumer surveys.”). In this case, there is no evidence in the form of consumer surveys or
9 direct consumer testimony that the statements at issue actually influenced a purchasing decision
10 in the substantive manner intended by the terms of the statute.

11 **3. Plaintiff Lacks Evidence of Injury Attributable to Statements from**
12 **the Telekenex Defendants.**

13 Finally, Plaintiff must establish that it has been injured as a result of the alleged
14 deception. “In a suit for damages under section 43(a)...actual evidence of some injury resulting
15 from the deception is an essential element of the plaintiff’s case.” *Harper House, Inc.*, 889 F.2d
16 at 210. A plaintiff must prove “both the fact and the amount of damage.” *Use Techno Corp. v.*
17 *Kenko USA, Inc.*, 2007 U.S. Dist. LEXIS 85916 (N.D. Cal. Nov. 20, 2007) (granting summary
18 judgment for defendant where plaintiff had failed to disclose damages) (citing *Lindy Pen Co.,*
19 *Inc. v. Bic Pen Corp.*, 982 F.2d 1400, 1407 (9th Cir. 1993)). Neither Mr. Gold nor Mr. Perry
20 was able to identify a single customer who made a decision to abandon a Straitshot contract for
21 services based upon “false” statements attributable to a Telekenex Defendant prior to the time
22 that Straitshot itself released its customers. Accordingly, there is no evidence of injury.

23 **C. The Telekenex Defendants did not Violate the Washington Consumer**
24 **Protection Act.**

25 The Washington Consumer Protection Act (“CPA”) declares unlawful “[u]nfair methods
26 of competition and unfair or deceptive acts or practices in the conduct of any trade or
commerce.” *See* Wash. Rev. Code § 19.86.020. To establish a violation of the CPA, a plaintiff

1 must establish: (i) an unfair or deceptive act or practice; (ii) occurring in trade or commerce; (iii)
 2 a public interest impact; (iv) an injury to plaintiff in his or her business or property; and (v)
 3 causation. *Hangman Ridge Riding Stables, Inc. v. Safeco Title Ins. Co.*, 105 Wn.2d 778, 780,
 4 719 P.2d 531, 533 (1986).

5 “[F]or conduct to be an unfair or deceptive practice under the CPA, it must have the
 6 capacity to deceive a *substantial portion* of the public.” *Segal Co. (Eastern States), Inc. v.*
 7 *Amazon.com*, 280 F. Supp. 2d 1229, 1232 (W.D. Wa. 2003) (granting defendants’ motion for
 8 partial summary judgment on CPA claim) (emphasis added, internal quotation marks and citation
 9 omitted). In *Segal Co.*, plaintiffs alleged that the manner in which defendant solicited their
 10 business had the potential to deceive a large portion of the public. The court dismissed the CPA
 11 claim where “plaintiffs’ allegations do not allow the reasonable inference that defendant engaged
 12 in the sort of random widespread solicitation of consumers prohibited by these cases.” *Id.*

13 Here, as in *Segal Co.*, Plaintiff is unable to show that any “widespread” deception
 14 occurred. At worst, Plaintiff can possibly prove that the Telekenex Defendants targeted certain
 15 of their customers in an effort to lure them away from Straitshot—but the customers that were
 16 the targets of these acts were customers that Defendants Prudell and Radford identified as likely
 17 to follow them to a new employer based upon past relationships. There is no indication at all
 18 that the Telekenex Defendants attempted to solicit customers on a widespread or general basis,
 19 and there is no evidence of “a pattern or generalized course of conduct, creating a real and
 20 substantial potential for repetition of defendant’s conduct.” *Segal Co.*, 280 F. Supp. 2d at 1234;
 21 *see*, also Section IIC, above. The Telekenex Defendants request that the Court so find and award
 22 the Telekenex Defendants summary judgment of dismissal of this claim.

23 Furthermore, Straitshot fails to adduce any evidence that the actions of the Telekenex
 24 Defendants have the requisite public interest impact. The following determinations must be
 25 affirmatively established—but here are not: (1) the alleged acts must be committed in the course
 26

1 of defendant's business; (2) the acts must be part of a pattern or generalized course of conduct;
 2 (3) the acts must be repeated acts committed prior to the act involving the plaintiff; (4) there
 3 must be a real and substantial potential for repetition of the defendant's conduct after the act
 4 involving the plaintiff; and (5) if a single transaction, many consumers must be affected or likely
 5 affected by the complained-of behavior. *Hangman Ridge*, 105 Wn.2d at 790.

6 **D. The Telekenex Defendants did not Unlawfully Solicit Straitshot Employees.**

7 Plaintiff asserts that the Telekenex Defendants unlawfully solicited the Straitshot
 8 engineers, allegedly interfering with Straitshot's "contractual relations."¹¹ However, Mr. Gold's
 9 assumptions and/or speculation that Telekenex solicited its technical staff in breach of a
 10 contractual relationship is not sufficient to withstand summary judgment. *Villiarimo v. Aloha*
 11 *Island Air, Inc.*, 281 F.3d 1054, 1065 (9th Cir. 2002).

12 In any event, even if Straitshot's proof consisted of more than Mr. Gold's presumptions,
 13 the Washington Supreme Court explained that to make a claim for tortious interference with a
 14 business expectancy, a plaintiff must (1) point to a business expectancy with a third party, (2)
 15 must show that defendant was aware of the expectancy, and (3) must allege that defendant
 16 interfered with the expectancy. *Calbom v. Knudtson*, 65 Wn.2d 157, 164-65, 396 P.2d 148
 17 (1964). None of these elements are met here. Straitshot and the engineers had only an at-will
 18 relationship, which by its nature was terminable at any time, for any reason. *Thompson v. St.*
 19 *Regis Paper Co.*, 102 Wn.2d 219, 225-26, 685 P.2d 1081 (1984). Telekenex was not aware of an
 20 "expectancy" on the part of Straitshot that its at-will employees were bound to the company or
 21 restricted in any way from leaving Straitshot's employment. To the extent Straitshot had such an
 22 expectancy, it was unfounded. Making an offer of employment to an at-will employee cannot,
 23 and does not, interfere with any legitimate expectancy on the part of Straitshot.

24 Straitshot cannot establish a cause of action relative to "soliciting" its engineers absent
 25

26 ¹¹ This claim is not clearly pleaded in the TAC, but both Mr. Perry and Mr. Gold alluded to it.

1 first establishing that Telekenex breached or caused a breach of a contractual obligation. *Newton*
 2 *Ins. Agency v. Caledonian Ins. Group*, 114 Wn. App. 151, 157-158, 52 P.3d 30 (2002); *Calence*
 3 *v. Dimension Data Holdings*, 2007 U.S. Dist LEXIS 36235, *14 (W.D. Wash. 2007) (“[P]laintiff
 4 lacks any evidence of tortious interference. Plaintiff point to no evidence in the record that
 5 defendant interfered with the contractual relationships between plaintiff and the individually-
 6 named co-defendants or between plaintiff and the other former employees.”) Straitshot here is
 7 wholly unable to establish the elements of a claim that Telekenex wrongfully solicited its
 8 engineers, and this assertion must be dismissed as a matter of law.

9 V. CONCLUSION

10 For all of the reasons set forth above, the Telekenex Defendants ask that the Court award
 11 summary judgment as to (1) Plaintiff’s claim that the Telekenex Defendants violated the Lanham
 12 Act; (2) Plaintiff’s claims that the Telekenex Defendants violated the Washington Consumer
 13 Protection Act; (3) Plaintiff’s claim that the identity of their customers is a “trade secret;” and (4)
 14 Plaintiff’s claim that the Telekenex Defendants tortiously solicited employees of Straitshot.

15
 16
 17 Dated: November 24, 2010

s/ Leigh Ann Collings Tift

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CERTIFICATE OF SERVICE

I hereby certify that on November 24, 2010, I electronically filed the foregoing with the Clerk of the Court using the CM/ECF system which will send notification of such filing to the following:

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**TELEKENEX DEFENDANTS' MOTION FOR PARTIAL
SUMMARY JUDGMENT - 18**
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